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THE SOCIALIZATION OF THE LAW.

The lawyer cannot but be struck by the vast amount of legislation and still greater influx of proposed reforms which seek to "socialize" the law and to change its fundamental and traditional regard for the rights and responsibilities of the individual.

The concept of justice is no longer individual but social. Society today is no longer so much concerned about the rights of each as about the rights of all of us and individual rights are being greatly restricted by the recognition of so-called social rights.

A lawyer writing to a contemporary, cries out piteously: "Where are we at? Where are we going to? May a man no longer do what he will with his own?" This is the cry of the individualist who is lost amid the strange sounds and unfamiliar voices of a new era. And many lawyers who fail to recognize in the researches of the social scientist the source of future change in the traditional or common law, marvel at the apparent ease which new conceptions of legal right gradually creep into the law even without the aid of statute. This phenomenon, however, ought not to be a matter of surprise to lawyers acquainted with the history of the law who should readily recall to mind the gradual infusion of morals into the law through equity and the gradual acceptance of the usages of merchants which even today is still called the law merchant.

Prof. Roscoe Pound of Harvard University, a few years ago, called attention to the present changes taking place in the law when he declared that "there are many signs that fundamental changes are taking place in our legal system and that a shifting is in progress from the individualist justice of the nineteenth century, which has passed so significantly by the name of legal justice, to the social justice of today."

Attorneys who complain of the instability of legal principles today should recognize that what they properly regard as a most desirable characteristic of law—its certainty—is impossible in a period like this, when principles of justice are in a state of flux due to changed conditions in the organization of society and of industry. When these new principles shall have been molded into definite shape the law will then enter another period of certainty and repose. The feudal lawyers of the eighteenth century passed through the same experience which the lawyers of today regard with so much impatience. That was the time when the merchants were striving to gain the recognition of the law for their customs and usages which were in many respects out of harmony with the accepted concepts of justice of that age.

The fact that there is a strong demand for the socialization of the law was made especially clear in the discussion that took place the last week in December before the Economic Section of the American Association for the Advancement of Science, which held its 1919 meeting in the City of St. Louis. The interesting discussions of the railway problem, the labor situation, the social aspects of the concept of property, etc., not by superficial reformers but by scientific seekers after the truth—based on present conditions—served to call attention to the fact that the old forms of social and industrial organization have so changed that the legal principles of the last generation will not suffice to solve the practical problems likely to arise in the immediate future.

By reason of the expression of certain opinions on the problem of the present social unrest in editorials which recently appeared in the *Central Law Journal*, the editor was invited to lead the discussion on the legal rights of the owner, the workers and the people in industry.

We have no intention to review the discussion of this subject at this conference but simply to call attention to the fact that there is a considerable difference in the point of view taken by lawyers and social economists, especially in regard to the property rights of persons interested or involved in industry. The old theory that the owner of a thing is practically an absolute monarch, while perfectly accurate in a state of society where each individual in respect of his own property is, in a sense, independent of the action of others in respect of their property, has no possible application in a state of society where each individual and even society itself is absolutely dependent on the proper use on the part of every other person of the property or industry which such person calls "his own." In other words, the worker, in industry, has some rights, not yet accurately defined, which considerably restrict the absolute rights of the owner; and the people themselves, the ultimate beneficiaries of industry, have rights, also awaiting clear definition, which restrict the rights of both the owner and the worker and justify the interference of the law on their behalf.

This threefold character of rights in property and industry is one of the most important tenets of modern social science. Without doubt this new conception of the social character of industry is the justification for the multiplication of Boards and Commissions vested with authority and powers to define and determine the conflicting rights or interests of owners, workers and consumers in property engaged in industry. The new Railway Act which recently passed the Senate and is now in conference, is a clear recognition of this new idea, the provision for Regional Boards of Administration evidencing the tendency to create new tribunals to enforce the new rights that now for the first time receive the explicit recognition of the law.

Whether the courts will ever ultimately absorb the jurisdiction and powers of these *quasi* judicial tribunals is a matter on which we would not care to risk a prediction, but we are certain that the regulation and administration of industry in the interest of all parties concerned in it will be one of the most outstanding achievements in the science of sociological jurisprudence and one of the most important mileposts that mark the advance of legal principles.

NOTES OF IMPORTANT DECISIONS.

DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES BY REASON OF OUTSTANDING LEASE.—The general rule is, in the absence of special circumstances, that the measure of damages for breach of a covenant against incumbrances by reason of an outstanding lease is the value of the use of the premises during the remainder of the life of the lease. An instance of "special circumstances" where such a measure of damages is insufficient is to be found in the recent case of Estep v. Bailey, 185 Pac. Rep. 227, in which the Supreme Court of Oregon holds that where lessee of grantor has sowed a crop of wheat which the vendee of the grantor harvested and was compelled to pay for by judgment in favor of the tenant, the grantor is liable not only for the full amount of the judgment but for reasonable attorneys' fees (in this case $50) incurred in defending the tenant's suit.

In this case the grantor insisted that he should not be liable for the full value of the crop but only for the rental value. On this point the court said:

"The crop of wheat and vetch was a part of the real estate sold and conveyed by defendants to plaintiff, and the title to the grain should have passed by the deed to the plaintiff. The defendants covenanted that they were the owners of the property, including the crop. On account of the outstanding lease at the time of the conveyance, and in order for plaintiff to obtain the benefit of the fruit of the land which she had purchased, and to which she was entitled, and to remove the effect of the incumbrance, she was compelled to pay $208.15. Therefore the plaintiff was actually damaged by reason of the breach of the covenant in that sum. The rental value of the three acres for the unexpired term of the lease from January, 1917, until the crop was removed, would not be a fair compensation for plaintiff's damages, as nearly one-half of the time between the planting and harvesting of the crop had elapsed at the time of the purchase and conveyance. Plaintiff, by reason of her purchase and deed, was entitled to the benefit of the time that had elapsed, as well as to the result of the labor in preparing the land and planting the crop and the seed

therefor. Therefore, under the peculiar circumstances of this case, the rental value rule could not well be applied. She was entitled to recover compensation for the injury resulting to her by reason of the breach of the warranty. The case comes within the exception to the rule where "special circumstances" exist. The underlying principle in cases of this character is that the damages should be estimated according to the real injury caused by the existence of the incumbrance. This would include compensation for trouble and expense caused plaintiff on account of such incumbrance. Fritz v. Pusey, 31 Minn. 368, 18 N. W. 95; Musial v. Kudlik, 87 Conn. 164, 87 Atl. 551, Ann. Cas. 1914D 1172; Sarlls v. Beckman, 55 Ind. App. 638, 104 N. E. 598."

In the case of Clark v. Fisher, 54 Kan. 403, 38 Pac. 493, the court said:

"When the premises conveyed by a deed from a grantee to a grantor with a covenant against incumbrances have a growing crop thereon at the delivery of the deed, belonging to a tenant of the grantor, and the grantee is deprived of the possession on account of the unexpired term of the lease of the tenant, the value of the crop less the cost and expense of taking care of and harvesting the same may be considered in estimating the real injury to the grantee arising from being deprived of the possession of the premises until after the crop is harvested and

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AWARDS IN WORKMEN'S COMPENSATION CASES OF SUMS PAYABLE IN MONTHLY INSTALLMENTS.—An interesting problem of construction of the Workmen's Compensation Act confronted the Supreme Court of Kansas in the recent case of Boyd v. Crowe Coal and Mining Co., 185 Pac. Rep. 9.

The Kansas Act provides that no award "shall be or provide for payment of compensation in a lump sum." Subsequent provisions provide for certain contingencies under which claimant may procure a judgment on the "award" for a lump sum not exceeding 80 per cent of the award. Another provision permits the defendant to discount the future payments at 20 per cent of their face value.

In the case before us an award of $3,800 was found for the widow of a workman killed in defendant's mine. This sum, except for a small amount that had accumulated since the filing of the claim, was ordered "to be paid at the rate of $15 per week until the whole sum shall have been paid." In seeking to modify this award and to secure a judgment for the full amount of $3,800 the plaintiff alleged that "if said award is permitted to stand, the rights of this plaintiff will be greatly prejudiced, for the reason that the defendant, if said award is permitted to stand, may, under the provisions of § 5927 of the General Statutes of 1915, as amended by the Session Laws of 1917, relating to workmen's compensation, after the lapse of six months from the date of the death of said G. A. Boyd, redeem the payments prospectively due under the award, by paying a lump sum and receiving a discount of 20 per cent on the sum of $3,410, which discount amounts to the sum of $682."

The Supreme Court of Kansas found the problem by no means easy of solution, but referred the parties to the legislators who were responsible for the confusion. The judgment of the lower court was sustained.

TRANSFER TAX NOT A TAX WHICH MAY BE DEDUCTED IN COMPUTING FEDERAL INCOME TAX.—Lawyers are again face to face with income tax problems. Not the least difficult of these problems is that of determining what State taxes may be deducted from income. For instance, may a tax on inheritance be deducted? The Income Tax Law (Par. B, Sec. 2, Oct. 3, 1913) provides for deducting from income "all national, State, county, school and municipal taxes paid within the year, not including those assessed against local benefits." On the other hand, the Income Tax Law does not treat property inherited or transmitted by will as income, but specifically exempts such property from being reported as income.

The problem here involved was recently passed upon by the U. S. District Court (S. D. N. Y.) in the case of Prentiss v. Eisner, 260 Fed. 589. In this case the Treasury ruling that "a collateral inheritance tax levied as a charge against the corpus of the estate does not constitute such an item as can be allowed as a deduction in computing income tax liability to either the estate or the beneficiary" was sustained.

The interesting question here involved is whether an inheritance tax is a tax on the right of inheritance or whether it is a prior appropriation by the State of part of the corpus of the property which is allowed to pass by inheritance or devise. In the Eisner case the court adopts the latter theory and says:

"I do not think it follows, because the right to transmit or the right to receive the property of a decedent is a privilege granted by the State, and not a common right, that the tax is imposed upon either right. Judge Gray's statement in Matter of Swift, 137 N. Y. 77, is an accurate description of what occurs:

" 'What has the State done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way directed by the testator or permitted by its intestate law.'

"To say that the legatee, devisee, heir or distributee receives the property without any deduction and then pays the tax is really a most artificial way of viewing the transaction. In the

case of personal property he really only gets the balance, with a credit as a matter of convenient bookkeeping to the amount of the tax. In the case of real estate he receives, properly speaking, an equity. He can pay the tax and get the land freed from the incumbrance, or the State can foreclose the lien and he will receive the balance. In either case the only natural way to treat him is as a recipient of a net amount. The condition of the devolution of the property is the receipt of the transfer tax by the State."

This decision, it seems to us, is not only logical but eminently fair. It would be ridiculous to exempt a legacy or devise in the computation of one's income and then permit the legatee or devisee to deduct from other income the tax paid on such legacy or devise. The decision is also in accord with the decision of the U. S. Supreme Court in the case of United States v. Perkins, 163 U. S. 625, at p. 630, where the court said:

"The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the Legislature assents to a bequest of it."

IS CONGRESS OBSTRUCTING REFORM IN JUDICIAL PROCEDURE?

Inquiry is not infrequently made of us concerning the failure of the bills in Congress to give the Supreme Court of the United States power to make rules of pleading and practice governing the law side of Federal courts. Some inside information was given concerning the attitude of Congress toward these measures by Hon. Walter George Smith of Philadelphia, former president of the American Bar Association, in an address before the California Bar Association on June 7, 1918. We quote what Mr. Smith has to say on this subject:

"The reproach of an undue conservatism directed against our profession has been to some extent deserved in the past, but that there is among the great majority of lawyers an earnest desire to meet the evident needs of a readjustment of practice and procedure will be evident to anyone who skims the pages of the reports of the national, state and local Bar Associations throughout the country. Since 1912 a systematic effort has been made by the American Bar Association, through its Committee on Uniform Judicial Procedure, to bring about a general uniformity in federal and state procedure by an amendment to the statutes of the United States, which would give to the Supreme Court the power to make rules of practice in common-law procedure, as it has already done in equity. Repeatedly the bill has reached late stages in Congress, only to be laid over because of the objection of a Senator or Senators who are unconvinced by the authority of the most respectable associations, including the American Bar Association and the State Bar Associations of New York, Massachusetts, Alabama, Oregon, Maryland, Mississippi, South Dakota, Pennsylvania and many others (46 in all), as well as the National Conference of Commissioners on Uniform State Laws, and eminent teachers from the leading law schools. It should be obvious that if a simple and elastic set of rules governing and completing a procedure were formulated and put in force in all of the federal courts, it would not be long before, by reason of their intrinsic excellence, they would be adopted under authority of the necessary legislation by the state courts. But it is held up by those who seek to reform the practice of our courts on a theory which is directly contrary to the spirit of our constitutional tripartite division of the functions of government, a spirit which is imbued with distrust of the judicial department and presses against it to the very verge, if not beyond, of unconstitutional legislation. It is the spirit which would, if possible, concentrate in the Legislature all of the powers of government and make it submissive to the emotions of the populace rather than the delegated authority to speak for it with measured and dispassionate judgment. Instead of giving to the courts the full responsibility to which, under the law, they are always to be held to a strict account, harassing obstacles are sought to be thrown in their way and in-

sidious efforts to undermine their power are incessantly made by uneducated or prejudiced people who fail to find the safeguard of constitutional democracy in the strength of popular confidence in the courts as the oracles of justice." A. H. R.

SOME RECENT DECISIONS IN THE BRITISH COURTS.

A litigant, and especially one who is defending himself, is entitled to state in defense everything which is pertinent to the issue raised by the pleadings. If what is stated in defense is pertinent to that issue and especially if it is relevant thereto, the litigant is presumed to have acted in *bona fide* and in pursuance of his undoubted right and privilege to defend himself from attack. The occasion, in short, is one which is highly privileged and in which the litigant will be completely protected unless it be clearly and specifically averred and proved that he was actuated by malice in making the statement. If the statement complained of is manifestly impertinent to the issue raised by the pleadings the occasion is not privileged; the case is then one of ordinary slander in which no privilege is enjoyed by the defender and in which he is presumed to have acted maliciously. These general principles have been so well established that we rarely meet with an action of judicial slander, such as was before the court in Mitchell v. Smith.[1] In defense to an action for breach of contract the defender made averments of fraud in consequence of which the slander action referred to was raised. The Lord Ordinary (Anderson) held the action irrelevant, but the First Division, by a majority, held that the averments made were relevant to infer malice and remitted the case back to the Lord Ordinary. The judges composing the majority were Lords MacKenzie and Cullen; Lord Sands was the dissenting judge. There being thus two judges on each side of the question, the case cannot be considered a strong authority.

The averments which were considered sufficiently specific to enable the pursuer to a proof were to this effect—that the defender made no inquiry regarding the truth of the statements complained of; he had no precognition on which to base his allegations; he led no evidence in support of them; he did not believe in their truth and never intended to establish any of the statements complained of; they were put on record not with the view of maintaining his defense, but for the oblique purpose of intimidating the pursuer and compelling him to abandon his action rather than allow the statements to be widely circulated and made the subject of public comment. These averments were as above stated held to be of such a character as to entitle the pursuer to the opinion of a jury.

Britain Steamship Co. v. The King[2] was a Petition of Right against the Admiralty brought with the object of determining the respective liability of the Crown and the underwriters in certain classes of losses during the war. During the war British ships were usually protected against loss in two ways, by an ordinary policy of marine insurance in the case of "sea risks," and by the Crown—either by special policy or otherwise, according to the relationship of the ship to the Government service—against risks arising out of "warlike operations." In a large number of cases, however, the loss has been due to some cause which is at once a "sea risk" and connected with "warlike operations," and the question of liability in all such cases depends on whether or not the "warlike operations" were the *causa proxima* of the sea risk. In the case before the court a ship was lost by what unquestionably was an ordinary sea risk. But in fact she was wholly in the service and under the control of the Admiralty when lost, having been requisitioned by the Director of Transport and chartered for Admiralty service. The underwriters

(1) 1919. 2 S. L. T. 117.

(2) 1919. 1 K. B. 575.

claimed that, as she was completely under Admiralty control for war use, "warlike operations" must be held to be the *causa proxima* of any and every sea risk and loss she might suffer. This is arguable enough in view of the long line of cases where stranding or collision of a ship obeying the directions of a convoy has been held to be the result of "warlike operations," but the court refused to give so wide an extension to a doubtful principle, and held that the operations were not the *causa proxima* of the loss.

We would call attention to the decision of the Court of Appeals in Woodall v. Pearl Insurance Co. Ld.[3] It was an action for recovery of insurance money and the policy contained the usual clause of reference to arbitration. The company had refused to pay on the grounds that the assured had misstated his occupation or in any event had changed his occupation during the continuance of the policy without informing the company; and also on the case coming into court, the company pleaded that the action was excluded by the arbitration clause. The court held that arbitration was a condition precedent to action, that is, they decided that the merits of the claim should be submitted to arbitration and thereafter if necessary the amount awarded in the arbitration could be sued for.

The case is of special interest in relation to two other important cases of arbitration clauses in contracts, which are referred to in the judges' opinions. The first of these,[4] decided that where a person or an insurance company is repudiating a contract in the sense that it is disputing the existence of any binding contract at all, then the whole contract is involved and even though the contract contains an arbitration clause action in court, not arbitration, is the proper remedy. The other case[5] decides that where a person or insurance company is repudiating any liability under a contract but accepts the existence of the contract as a binding contract, then arbitration (assuming a clause of reference to arbitration is in the contract) is the proper remedy and excludes action. In Woodall's case the court put the question, under which of these two cases the question before them fell and as stated they held that it was governed by Stebbing's case and found in favor of arbitration.

(3) 1919. 24 Com. Ca. 237.
(4) Jureindini v. National British and Irish Insurance Co., 1915 Appeal Cases 499.
(5) Stebbing v. Liverpool and London and Globe Insurance Co., 1917. 2 K. B. 433.

DONALD MACKAY.

Glasgow, Scotland.

CHANGE OF RATES OF PUBLIC UTILITY WHICH HAVE BEEN FIXED BY FRANCHISE ORDINANCE.

Preliminary.—Within the past two years many public utilities have, because of the increased cost of labor and war-time prices, applied for increase of rates and resistance thereto has been made upon the ground that to grant such increase would be an impairment of the obligation of contract forbidden by the Federal Constitution. This resistance has been ruled upon variantly by the courts, some of them distinguishing between a municipality granting rights upon a condition precedent and that arising out of private contract. Incidentally the question of a long term arrangement with a municipality and that for a definite but brief term. The effect of the state's police power has been alluded to in practically all of the cases.

Rates in Private Contract and in Franchise.—The Supreme Court, in a case where a corporation had a contract with a public service corporation to supply it with electric light and power at a certain rate for a term of five years and during said term the railroad commission of Georgia authorized an increase in rates, held the public service corporation not bound by its

contract.[1] The court said, citing Manigault v. Springs,[2] that "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from (properly) exercising such powers * * * for the general good of the public though contracts previously entered between individuals may thereby be affected." And further, quoting from Louisville & N. R. Co. v. Mottley,[3] it was said that "Contracts must be understood as made in the rightful exercise of the rightful authority of government, and no obligation of a contract can extend to the defeat of legitimate government authority." This was stated as to a contract lawful when made, but made unlawful afterward under interstate commerce clause, but it would seem to be equally true under rightful exercise of a state's police power. A late work by the author of this article[4] speaking of discrimination lawful under one classification at the time it is made, says: "But no contract can be the basis for such a discrimination, whether prior or contemporaneous, as it comes under the power to regulate the utility itself." There are cited in support of this many U. S. Supreme Court cases and among them the Mottley case *supra*. But it is also clear, that the right to disregard the obligation of contract has been expressly declared, when the exercise of a state's police power is involved. Thus the opinion in United Dry Goods Co. case *supra*, says: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations * * *; that this power can neither be abdicated, nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise," excerpt from a former decision.[5]

Later than all of the cases above spoken of is a decision by the U. S. Supreme Court, which held, that, where a municipal ordinance granted a street railway a franchise which obligated the railway to give service at a certain rate for fares, that this constitutes in Ohio an absolute bar against any change of rate, one party thereto objecting.[6] There is not in the opinion in this case any reference whatever to the case in 248 U. S. 60, nor to any of the cases it cites, and both opinions were by a unanimous count. As this opinion appears to distinguish between private contract rates and franchise rates, in their alterable effect, it becomes necessary to examine more particularly the exact purport of the latter, especially as there are variant rulings in state courts as to the effect of a franchise in the fixing of rates for public utilities.

Particular Bearing of the Columbus Case.—Justice Day says: "The insistence on the part of the city is that, under the controlling laws of Ohio, in force when these ordinances were passed and accepted, and the terms of the ordinances, binding contracts were created * * * for the period of twenty-five years upon the terms and conditions set forth in the ordinances. * * * Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinances in question." Then he refers to a prior decision,[7] wherein it was said: "In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right

(1) Union Dry Goods Co. v. Ga. Public Service Corporation, 248 U. S. 372, 39 Sup. Ct. 117, P. U. R. 1919C, 60.

(2) 199 U. S. 473, 50 L. ed. 274, 278, 26 Sup. Ct. 127.

(3) 219 U. S. 467, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671.

(4) Collier on Public Service Companies, § 132.

(5) Atlantic C. L. R. Co. v. Goldsboro, 232 U. S. 548, 558, 34 Sup. Ct. 364, 58 L. ed. 721.

(6) Columbus Ry. P. & L. Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349, P. U. R. 1919D, 239.

(7) Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102.

to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might thereafter be charged." A critical analysis of this statement presents only a single thing to differentiate it from a contract between a public utility and a private party, except that *"benefits were conferred on the public,"* and this seems to be said merely *arguendo,* and it seems clear that nothing in a private contract could be said or agreed to, or any rights surrendered or benefits conferred which could prevent the exercise of the state's police power thereupon. It is said, however, that "While the precise question was not before the court in Interurban R. & T. Co. c. P. U. Comm.[8] * * * it is evident that the Supreme Court of Ohio takes the same view of the effect of such ordinances as was declared by this court in the Cleveland case." In that case the U. S. Supreme Court speaks of the view by Ohio courts that there arose under ordinances by an Ohio municipality binding contracts, but statutes of Ohio are not specially discussed except to show that "there was lodged by the Legislature of Ohio in the Muncipal Council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions" upon which they should operate, but there is no specific direction that the state's police power in this respect might be abdicated or bargained away. The Cleveland case *supra* was succeeded by others,[9] but these cases do not discuss Ohio statutes with any fuller particularity nor make any reference to the abdication or bargaining away of the state's police power, nor does either of the cases say specifically that the city might not lower the rates fixed in the district court reviewed. In 249 U. S. 399 *supra,* it is said: "No question is made but that the legislature of a state may, unless restrained by State Constitution, contract away this (police) power, either by an enactment of its own or by delegating to the municipality power to do so. The Milwaukee case[10] only holds that * * * it did not clearly and unmistakenly appear that the state had contracted away this function of government or had delegated to the municipality the power to contract it away." In the Milwaukee case *supra* the unanimous opinion was written by the same Justice who wrote the opinion in 249 U. S. 399 *supra,* and he there said: "It has frequently been held that where a statute of a state is alleged to create or authorize a contract inviolable by subsequent legislation of the state, in determining its meaning, much consideration is given to the decisions of the highest court of the state. Among other cases which have asserted this principle are Freeport Water Co. v. Freeport, 180 U. S. 587, and Vicksburg v. Vicksburg Water Co., 206 U. S. 496, 509."[11] But in 249 U. S. 399 *supra,* the court appears to take as conclusive the view of the Ohio courts that its statutes did intend to surrender the state's police power in granting to municipalities the power to make binding contracts with a street railways.

State Decision That Intent to Surrender Police Power Must Be Clear.—Pennsylvania Supreme Court, after stating that private contracts with public service companies are made upon the presumption of

(8) 98 O. St., 120 N. E. 831, P. U. R. 1919, B212.

(9) Cleveland v. Electric Ry. Co., 201 U. S. 529, 26 Sup. Ct. 513; Cleveland Elec. Ry. Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202.

(10) Milwaukee Elec. R. Co. v. R. Comn., 238 U. S. 174, 35 Sup. Ct. 820.

(11) Columbus R. P. L. Co. v. Columbus, 253 Fed. 499.

the right of change under state police power, said: "There seems to be no difference in principle between the case of a contract indeterminate and one that is determinate; nor is there any difference in principle between a contract with a borough, with a corporation or with an individual. Any contract of this character, whether for a definite or indefinite period, must give way when its terms conflict with the rates fixed later by a public service commission."[12] Tennessee Supreme Court, in a decision handed down July 3, 1919,[13] held that a statute creating a Railroad Commission and authorizing it to fix rates of public utilities does not impair the obligations of contract in a franchise ordinance of a city limiting fares, because "in this state it has been held that the general governmental powers of the state cannot be bargained away. (Lynn v. Polk, 8 Lea. 121.)" In Missouri it was said to be settled in that jurisdiction that rates fixed by franchise and contract are revisable by state agencies in the exercise of the police power to regulate rates.[14]

Rates Fixed Under Constitutional Franchise.—A decision by Virginia Court of Appeals,[15] after first quoting from a U. S. Supreme Court decision,[16] that "there can be no question in this court as to the competency of a state legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to rates of fare, so as to bind during the specified period any future common council from altering or in any way interfering with such contract," said: "The abrogation of such continuing (police) power is never to be presumed," and it cites a very great number of cases where such abrogation was denied, saying: "None of these cases controvert the well-established rule of law that if the municipality * * * has expressly conferred upon it by statute the unlimited power to contract with the grantee of the franchise * * * and the municipality does so contract and the grantee accepts it and acts under it, the contract is irrevocable during its life." It is then said that the Virginia Constitution and Virginia Statute undoubtedly confer on municipalities absolute power to prevent public utility corporations from doing business therein without their consent, thus a power to impose conditions which may be arbitrarily imposed and this "is not necessarily to be regarded as a power of contract." This distinction appears to me rather shadowy, especially when to every ordinary apprehension there is a contract and not specially a condition imposed. The question would come up more squarely, if a state were vesting the power that had been confided to a municipality of control over its streets in a state commission as its successor in this respect. Certainly the municipality, which had been a mere arm of the government, could be abolished under a state's police power and its powers vested elsewhere. And if the imposing of conditions is not continual in its nature, then it is merely regulatory, and surely regulation may be taken away from the municipality.

Theory of Rate Fixing.—The prime purpose in the fixing of a rate for a public utility is to enable it so to operate as to earn fair compensation and only fair compensation. Both it and the public are possessed of property which is used in its operation and both are entitled to a like measure of reward for such use. It has been held to be confiscatory of the public utility's property to deny it either a fair valuation of what it devotes to public use or that it shall not earn fair compensation for its use. But it must be evident that the only way to determine this question is by

(12) Leiper v. B. & Pac. R. Co., 262 Pa. 328, 105 Atl. 551, P. U. R. 1919C, 397.

(13) Memphis v. Enloe, Tenn., 214 S. W. 71, P. U. R. 1919F, 508.

(14) Va.-W. P. Co. v. Com., Va., 99 S. E. 723, P. U. R. 1919E, 766.

(15) Detroit v. Citizens' St. Ry. Co., 184 U. S 368, 22 Sup. Ct. 410.

(16) Collier on Public Service Companies, p. 235.

taking into view present conditons in which valuation is put upon property and expense attending its devotion to public use. These things are in as constant a state of change as are markets. Values are altogether relative, and it cannot be imagined that any fixing of prices for the future is anything more than a sort of guess. But there is still another aspect to all of this. The public is interested in what becomes of its property in a certain sense—being devoted to public use. It must remain efficient for purposes to which it is devoted. This is police power over the matter in question. This is the thing in which is declared there exists every presumption against its being surrendered, and it cannot be bargained away, unless there is a clear intention that it is surrenderable. It seems to me that the state of Ohio was not clearly shown to have surrendered its police power over street railways. There is no express or explicit statement in any statute that it does surrender it.

Further, it seems to me that there is little to be gained in favor of the public utility companies that there should exist any surernder of a state's police power over a public utility. But at all events U. S. Supreme Court only holds that for the definite time in the contracts before the court and by a particular class of public utilities, there was a surrender of the state's police power. It did not hold that such power could be parted with for all time. There may be reason for saying that the interests of a particular utility and of the public as well would be promoted by declaring that contracts for a definite time would remain wholly unchangeable, when they are made with a subordinate agency of the government, though it also be the case that those with private parties are subject to change. But it well may be thought that this difference should unmistakenly appear. The state is in effect on both sides of contracts, when a public utility deals with an arm of public government. It has concern in no wrong being done by one to the other and it can lay down rules for the interpretation of their contracts.

N. C. COLLIER.

St. Louis, Mo.

BROKER—EXCLUSIVE AGENCY.

ALLEY v. GRIFFIN et al.

Court of Civil Appeals of Texas. Amarillo. June 11, 1919. Rehearing Denied Oct. 22, 1919.

215 S. W. 479.

The general rule is that one employing an agent to sell land for a commission on the sales may make sales himself or through other agents without liability to the first agent for commission on them; even where the agency is exclusive, the owner himself may sell without becoming liable for commission.

BOYCE, J. A decision of this case depends upon the construction of a land sales agency contract made between the appellant, as party of the first part, and the appellees, as parties of the second part, on the 4th day of December, 1916. By the terms of this contract the said Robert F. Alley, as party of the first part, appointed the parties of the second part, appellees, as exclusive agents to solicit purchasers for the sale of lands owner, controlled or listed for sale by party of the first part "in the shallow water district of Northwest Texas, including Hale and adjoining counties," until January 1, 1918. This exclusive agency covered certain territory in Iowa. The parties of the second part agreed to actively solicit purchasers for such land in said territory, and to deliver prospective purchasers to the party of the first part at Hale Center, at their own expense, and without cost to the first party. The appellant, as party of the first part, agreed to pay to the second parties as commission the sum of $5 per acre for each acre of land sold to any person resident in the territory assigned to the party of the second part, and to refer any inquiry from persons resident in such territory to the parties of the second part. The first party also agreed "to take proper care of prospective purchasers furnished by second party or their sub-

agents, when delivered to first party at Hale Center, or other point mutually agreed upon, to furnish two seven-passenger automobiles and show them lands for sale and make proper effort to sell them land and to furnish them meals without cost to second party." Said contract also contained the following paragraph, which furnishes the basis of this suit:

"The first party agrees to show any lands owned by second party to prospects furnished by them, and to aid in making sale for no other charge than a commission of one dollar per acre on all lands owned by second party and sold to second party by the first party in said shallow water district, and sold during the term of this contract."

During the existence of this contract the appellees sold about 1,600 acres of land in said shallow water district, owned by them, and purchased of appellant, Alley. While the appellant had shown this land to "prospects furnished by" the appellees, sale thereof was not made to any such persons, and the appellant did not show the lands, or aid in any way in making the sale to the persons who actually bought from the appellees. The appellant, Alley, brought this suit to recover $1 per acre commission on this sale, claiming that under the terms of the contract he was entitled to such commission whether such sale was in any way aided by him or not.

The general rule is that one employing an agent to sell land for a commission on the sales may make sales himself or through other agents, without liability to the agent for commission on such sales; even where the agency is exclusive, the owner may sell himself, and is not liable for commission. So that, in the ordinary contract providing for a commission to the agent on sales of the land made during the term thereof, the sales have reference only to sales resulting from the efforts of the agent. "The parties may, by contract, avoid the effect of this rule, as where the owner undertakes to pay a commission on all sales within a certain time, no matter by whom made." C. J. vol. 9, p. 576; Mechem on Agency (2d Ed.) 2445. In the cases referred to by the authorities making the statement just quoted, the contracts contained some express language or provision that clearly indicated that there was an agreement to pay the commission whether the agent participated in the sale or not. The contract in the case of Parkhurst v. Tryon, 134 App. Div. 843, 119 N. Y. Supp. 184, is more nearly like the one we are considering than any other authority we have found. In that case the written contract between the owner and the agent provided that the agent should "advertise and attempt to sell the property," and the owner agreed "that in case of the sale or conveyance of the said property at any time within one year * * * he will pay Parkhurst (the agent) 5 per cent of the amount of the sale," and it was held "that the sale referred to in the language above quoted was a sale made by Parkhurst, or one brought about by him." See, also, Tracy v. Radeke, 141 Iowa 167, 119 N. W. 525.

We construe the reference to "all lands sold during the term of this contract," taken in connection with the context, to refer to such sales as the appellant had aided in making. We therefore uphold the trial court's ruling on such matter, and affirm its judgment.

NOTE—*Exclusive Agency Not Preventing Sale by Owner Without Responsibility to Agent.*—Contracts of this nature are construed upon the theory that there shall be good faith between the owner and his agent. Thus it has been said: "It has been frequently held that the owner of real estate, by employing a real estate agent or broker to effect the sale of property, does not preclude himself from employing other agents for the same purpose, or from effecting a sale himself, provided, that in making the sale himself he acts in good faith; 'good faith' meaning that the owner would not be allowed, after making a contract with a real estate broker, to avail himself of the broker's services, where the broker had procured a purchaser, and to effect the sale himself, thereby depriving the broker of his commission." Moore v. May, 10 Ga. App. 198, 73 S. E. 29. The fact that the contract considered by the court provided that it was irrevocable for three months did not change this rule.

Where the contract provided that, if the agent found a purchaser, the owner agreeing, that no other agent should be employed, and the price being a certain amount, the facts show that the agent found a buyer for a less price which h submitted to owner, then the latter told the agent that as he had made some repairs, he would have to have a larger sum. Afterwards the owner sold to the party the agent had found for the price originally fixed. The agent, however, had not disclosed to the owner the name. The court considering that the increased price governed the agent, said: "Power to fix the price is incident to the right retained by the owner to sell, and an agent necessarily must take this into account, and, unless he cares to assume the risk of a sale by the owner to a prospective customer on terms different from those specified, he must disclose such purchaser's name in submitting his proposition. Indeed, there is an element of bad faith in withholding this information from the principal, with whom the agent is required to deal with candor and fairness, and it must be understood from the discussion that recovery might have been had, had the sale been at the price specified in the employment of plaintiff as agent." Gilbert v. McCullough, 146 Iowa 333, 125 N. W. 173.

There is a distinction between an exclusive agency and an exclusive right to sell, the former merely preventing the employment of other agents or brokers.

Thus in Dale v. Sherwood, 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720, 16 Am. St. R. 731, the court said: "It is settled at least in this state, that where an agency to sell real estate on commission is given, the exclusive right to sell not being given, the owner himself has still the right to make a sale independent of the agent, and in such case will not be liable to the agent for commissions unless he sells to a purchaser procured by the agent. This right on the part of the owner is an implied condition of the agency, subject to which the agent accepts it."

Under this rule it has been held that an owner acting in good faith and without any knowledge that a purchaser from him was induced by the agent to purchase, may himself sell to such purchaser, though he has clothed the agent with an exclusive agency. Smith v. Preiss, 117 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 820.

There are many cases, both English and American, taking this view.

Thus in Greene v. American Malting Co., Wis., 140 N. W. 1130, it was said the only general effect of the exclusive agency is to prevent the owner from placing the property in the hands of another agent. See also Ferguson v. Willard, 196 Fed. 370, 116 C. C. A. 406; Woolf v. Sullivan, 224 Ill. 509, 79 N. E. 646; Hurxthal v. Dalby, 168 Mo. App. 538, 153 S. W. 1066; Tracy v. Radeke, 141 Ia. 167, 119 N. W. 525, Ann. Cas. 1912B, 663.

But if the contract expressly stipulates for a definite period of time in which the agency is to be exclusive, this implies exclusive right to sell. Blumenthal v. Bridges, 91 Ark. 212, 120 S. W. 974, 24 L. R. A. (N. S.) 279. This, however, is opposed to Moore v. May *supra*.

After all, however, the element of good faith is stressed in these contracts of agency, and there is a question of construction of the contract creating the agency; e. g., in Green v. Cole, 127 Mo. 587, 30 S. W. 135, it was held that where an owner employs an agent to plot and sell within a fixed time and agent performs services under the contract, owner is liable for damages if he revokes and sells himself. In line with the instant case are Helling v. Darby, 71 Kan. 107, 79 Pac. 1073; Woodall v. Foster, 91 Tenn. 195, 18 S. W. 241. C.

ITEMS OF PROFESSIONAL INTEREST.

ANNOUNCEMENT OF 1920 MEETING AMERICAN BAR ASSOCIATION.

The next meeting of the American Bar Association will be held at St. Louis, Mo., Aug. 25-27, 1920.

It is with deep sorrow that we have learned of the sudden death of Hon. George W. Whitelock, the genial secretary of the Associaton. He passed away January 8, 1920. Only three days before we had received a letter from Mr. Whitelock, in which he promised to give the readers of the Journal a full report of the result of a recent referendum on a matter submitted to a vote of the members of the Association. The referendum referred to was on the following resolution:

"Whereas the Constitution of the United States and the Constitutions of the several states contemplate government by and for all the people and not by or for any particular class, group or interest:

"Now Be It Therefore Resolved, That the liberties of the people and the preservation of their institutions depend upon the control and exercise by the federal, state and municipal governments of whatever force is necessary to maintain at all hazards the supremacy of the law and to suppress disorder and punish crime."

THE LEGAL PERSONALITY OF A FIRM.

A partnership or firm is not, of course, as yet recognized in English law as having a legal personality of its own distinct from that of the persons who constitute it. Outside the law courts the notion of the firm being an entity distinct from its members—as a corporation is—has become part of the average business man's mental equipment. Certainly there is a tendency, even among lawyers, to regard partnerships as separate entities on the footing of corporations, and possibly the business man's view may yet at no very distant date, by legislation or judicial decision, become the technically correct view. The change would hardly be more revolutionary than that effected by the House of Lords' decision in the Taff Vale Railway case (1901 A. C. 426), that a trade union may be sued in its registered name, though "neither a corporation, nor an individual, nor a partnership between a number of individuals." The Legislature itself has much assisted the promulgation of the notion that a partnership has a distinct personality of its own by inserting in the Partnership Act, 1890, an express declaratory statement of the Scottish law on this point. By section 4 (2) of the Act it is formally enacted: "In Scotland a

firm is a legal person distinct from the partners of whom it is composed."

Cases like the Taff Vale case are, however, extremely rare, and abstract questions relating to the juridical nature of a partnership in English law are not likely to be raised directly in the courts. Such questions more commonly receive their answer indirectly, by the emergence of some principle forming the necessary foundation of some declaration of an individual right or liability. And cases of this kind are quite as likely to arise for decision in the oversea courts as in those of the United Kingdom. In illustration of this two cases may be cited, one from New Zealand and the other from Ontario, each of which displays the tendency above noticed to regard a partnership as a separate legal entity. The New Zealand case is, indeed, of practical interest on other grounds, relating as it does to the elucidation of a difficult enactment—section 3 of the Married Womens' Property Act, 1882.

The case referred to is Reeves v. Reeves' Official Assignee (1919 N. Z. L. R. 385), before the New Zealand Court of Appeal, and was concerned with the claim of a wife to prove in the bankruptcy of her husband for money lent him for purposes of his business. The husband carried on the business of a dairyman at one place, and was also a partner in a firm which also carried on a dairying business at another place. Both he and the firm became bankrupt. The wife had lent him money for his own business, and she sought to prove for her debt in competition with joint creditors of the firm, but after payment of the separate creditors of the husband. It was contended that under the relevant enactment, which is a transcription of section 3 of the English Married Women's Property Act, 1882, she must be postponed to all the creditors of the firm. By section 3 money of the wife lent to the husband for his business is to be "assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor * * * after, but not before, all claims of the other creditors of the husband * * * have been satisfied." Several difficult points have cropped up under this section, and the only one that need be now noticed is the meaning of "others creditors of the husband." Does this expression include creditors of the firm—of the husband and other persons taken together? There seems to be no reported case on this point. There is, however, the case of Re Tuff (1887 19 Q. B. D. 88), where it was held by Mr. Justice Cave that the section does not apply to a married woman lending money to a firm in which her husband is a partner. "The circumstances of the two cases are entirely different," and it was held that section 3 applied only where the husband is the sole trader. The New Zealand Court held that "creditors of the husband" did not include creditors of the husband's firm, the firm and the partner being quite distinct one from the other. The wife was therefore not postponed to creditors of the firm.

The Ontario case—Henderson v. Strong (1919, 45 Ont. L. R. 215)—draws an even sharper distinction between partner and firm, though the case is less practical in its interest than the New Zealand one. A company in Ontario was constituted under the Companies Act of Canada—Rev. Stat. of Canada, 1906, c. 79. By section 29 (2) of this statute it is enacted "The company shall in no case make any loan to any shareholder of the company." One of the shareholders was a member of a partnership in Scotland, and a loan was made by the company to this Scottish firm. It was contended that the loan was illegal and void, as being made to a shareholder, but the Ontario Court would not accept this view, and held that there had been no loan to any shareholder, the firm and the partner being distinct entities, and the Scottish firm not being a shareholder in the company. Apart from the possibility of the status of the Scottish firm in Ontario being governed by Scottish law—which is, perhaps, doubtful—the view was definitely expressed that even in English law the firm and the partner were so distinct that the loan to the firm could not be regarded as in any sense a loan to the partner. The following observations of the Chief Justice of Ontario purport to be made entirely from the point of view of English, and not Scottish, jurisprudence: "Nor am I at all able to agree in the notion that the law does not recognize * * * the separate existence of co-partnership firms; that they are in no sense legal entities. They may sue and be sued. * * * in most of their attributes they are much the same as incorporated companies of unlimited liability; and I can imagine no good reason for lawyers shocking business men and business methods with fine-drawn notions regarding the want of legal existence of concerns the actual existence of which is ever before the eyes of everyone." This will certainly "shock" the orthodox lawyer. Possibly some people will think it merely a little in advance of juridical public opinion.

—English Exchange.

CORRESPONDENCE.

"MASSACHUSETTS TRUSTS" AS BUSINESS COMPANIES

Editor of the Central Law Journal:

My attention was called yesterday for the first time to the leading article in the Central Law Journal dated October 17, 1919, entitled "The Massachusetts Trusts as a Substitute for Incorporation."

I wish to state that the term "Massachusetts Trusts" is as inapplicable as that other term sometimes applied to trust organizations, namely, "Voluntary Associations."

These trust organizations date back for generations wherever the English Common Law has been in use.

Massachusetts can no more claim to be the place of origin of such trusts than New York or Missouri. Because they may have of late become more in use in Massachusetts does not alter this.

I am sending you under another cover a pamphlet of mine on this subject, and suggest that in that connection you read the review of that little brochure of mine which appeared in the American Economic Review for March, 1914, pages 155 to 158, and which was written by Francis Lynd Stetson, at one time president of the New York Bar Association and understood to be the private counsel of the late Mr. J. P. Morgan.

Yours very truly,

ALFRED D. CHANDLER.

Boston, Mass.

[We have invited Mr. Chandler to discuss the question of the origin, value and limitations of voluntary associations in the nature of trusts organized for business purposes. Lawyers, we are sure, are anxious to get all the light possible on this interesting question.—Ed.]

BOOKS RECEIVED

"British Labor Conditions and Legislation During the War," by M. B. Hammond, Professor of Economics, Ohio State University and Representative of U. S. Food Administration on the War Labor Policies Board. Part of a Series of Preliminary Economic Studies of the War, edited by David Kniley, Professor of Political Economy, University of Illinois, under the auspices of the Carnegie Endowment for International Peace. Published by the Oxford University Press, American Branch, 35 West Thirty-second street, New York.

HUMOR OF THE LAW.

"No, Richard," she replied firmly, "I cannot accept you. I love you, but I can never be yours."

"Why not?" he demanded.

"I am a member of the Consolidated Sweethearts' Association, which is allied with the Lovers' Union, and I am, therefore, pledged to marry none but a union man. You, I understand, do not belong to the Lovers' Union."—

An Idaho lawyer tells of a case tried in that state some years ago, on which occasion the judge, an Easterner who desired to display his learning, instructed the jury very fully, laying down the law with the utmost authority. But the jurors, after deliberating some hours, found themselves unable to agree. Finally the foreman asked for additional instructions.

"Judge, here's the trouble," said he. "The jury wants to know if what you told us was really the law or only just your notion."—

One of our readers in Indianapolis thinks that facts are sometimes hampering, and says:

"The politicians who are running around and talking loosely about what the covenant of the league of nations provides without specific knowledge of what it will contain remind me of the advice that Senator Lindsey of Kentucky gave to Senator Joe Blackburn at Winchester. Mr. Lindsey knew that Mr. Blackburn was of large imagination and during a lull in the court proceedings of a will case in which they were on opposite sides Lindsey said, 'Joe, you ought not to be in the courtroom listening to the evidence in this case,' and when Blackburn inquired 'Why?' Lindsey said, 'It will spoil your speech to the jury.'"—Exchange.

Strolling along the quays of New York harbor, an Irishman came across the wooden barricade where immigrants suspected of suffering from contagious diseases are isolated.

"Phwat's this boarding for?" he inquired of a bystander.

"Oh," was the reply, "that's to keep out fever and things like that, you know."

"Indade," said Pat. "Oi've often heard of the Board of Health, but be jabbers, its the first time Oi've seen it."—Tit-Bits.

"Yes, I was fined $200 for putting coloring matter in artificial butter."

"Well, did you deserve it?"

"Perhaps. But what made me mad was that the magistrate who imposed the fine had dyed whiskers."—Milestones.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Color of Title.—It is immaterial that the title paper relied upon as color of title is defective, or even void as passing title, but the paper to constitute color of title must designate the land with certainty; the principal office of color of title being to define boundaries.—Blacksburg Mining & Mfg. Co. v. Bell, Va., 100 S. E. 806.

2. **Assignments**—Assigns. — The word "assigns" generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law.—Ferrell v. Deverick, W. Va., 100 S. E. 850.

3. **Bailment**—Implied Agreement.—In the absence of an express agreement by the bailee to return the bailed property to the bailor, the law implies such an agreement.—Loya v. Bowen, Tex., 215 S. W. 474.

4. **Bankruptcy**—Discharge. — A discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or false representations.—Brooks v. Pitts, Ga., 100 S. E. 776.

5.——Lis Pendens.—A creditors' bill and lis pendens filed more than four months prior to bankruptcy of the debtor and at the time of commencement of an action at law, as authorized by Gen. St. Fla. 1906, § 1961, to subject property conveyed by the debtor to the judgment in the action at law, held to create an equitable lien on such property under the laws of the state enforceable as against general creditors in bankruptcy, where followed by a judgment at law.—In re Pemberton, U. S. D. C., 260 Fed. 521.

6. **Bastards**—Civil Action.—Bastardy prosecutions are "civil actions," and a preponderance of the evidence is sufficient to establish the affirmative of any issue.—Kintz v. State, Ind., 124 N. E. 739.

7. **Bills and Notes**—Corporate Seal. — That seal of defendant corporation was not affixed to notes is conclusive evidence of a want of authority for the execution of the notes, nor a circumstance sufficient to create a suspicion that the notes were not wanting in consideration, or that their consideration had failed at the time of their transfer to plaintiff.—Commercial Security Co. v. Modesto Drug Co., Cal., 184 Pac. 964.

8.——Holder in Due Course.—A contract between maker and payee of a note which gives the maker a right of offset to the note is not available to the maker as against a holder in due course.—Commercial Nat. Bank of Charles City v. May, Ia., 174 N. W. 646.

9.——Notice to Holder.—The purchaser of a past-due note is charged with notice of any defense which the maker has, but is not charged with notice of the secret equities of third persons.—Etheridge v. Campbell, Tex., 215 S. W. 441.

10.——Promise to Accept.—The holder cannot sue the drawee on a promise to accept an existing bill, where the promise was made to drawer after bill had passed to holder, and where money sued for was paid or advanced by holder before such promise, and not upon the faith of the promise. — Pynetree Paper Co. v. Wilkinson County Bank, Ga., 100 S. E. 753.

11. **Bonds**—Consideration. — Courts should look at an undertaking and the recitals therein, and the legal proceedings out of which it grew, in order to determine its real consideration and conditions.—Grafton v. U. S. Fidelity & Guaranty Co., N. Y., 124 N. E. 742, 227 N. Y. 162.

12. **Brokers**—Exclusive Agency.—The general rule is that one employing an agent to sell land for a commission on the sales may make sales himself or through other agents without liability to th efirst agent for commission on them; even where the agency is exclusive, the owner himself may sell without becoming liable for commission.—Alley v. Griffin, Tex., 215 S. W. 479.

13. **Carriers of Passengers** — Assault.—The liability of a railroad company for assault and battery upon plaintiff passenger by its conductor, in an action in trespass vi et armis, does not lie in any legal fiction of "direct, intentional causation," as that the conductor was the alter ego of the defendant, but upon defendant's negligent failure to safely carry and protect plaintiff, which does not avoid the principle that a complaint charging direct authorization by the corporation is not supported by proof of an unauthorized act by an agent for which the corporation is liable on principle only of "respondeat superior."—Ex parte Louisville & N. R. Co., Ala., 83 So. 52.

14.——Res Ipsa Loquitur.—The doctrine of res ipsa loquitur, which may be invoked by a passenger injured in a railroad accident, does not depend upon the rule asserted in some jurisdictions that a carrier or passenger is bound to exercise the highest degree of care practicable,

but is equally available, under the rule declared in Indiana that there are no degrees of care, but that ordinary care only, which is that care commensurate with the dangers involved and the circumstances, must be exercised by a carrier of passengers.—Union Traction Co. of Indiana v. Berry, Ind., 124 N. E. 737.

15. **Chattel Mortgages**—Notice of Bill of Sale. —Mortgagee in a chattel mortgage given to secure prior indebtedness, even though considered a deed of trust, acquired no lien where he had prior notice that grantor had previously executed a bill of sale to another.—Henry's Ex'x v. Payne, Va., 100 S. E. 845.

16.——Retention of Title. — An instrument whereby title is retained to property sold, and title to other property as additional security is conveyed, is not a mortgage, but a conveyance carrying title for the security for debt.—Arnold v. Booth, Ga., 100 S. E. 779.

17. **Contracts**—Stifling Competition. — If a proposed joint adventure involved a secret agreement of members of trade organization to stifle competition while carrying before the public an appearance of competition, equity would turn away its ear in any proceeding by part of the members thereof against the other party for profits earned.—Goff & Heger v. Walker, Ia., 174 N. W. 661.

18. **Corporation**—Bonus Stock.—Stock issues as bonus stock in violation of Const., § 138, prohibiting corporations from issuing stocks or bonds except for money, labor or property received, is void.—Lavell v. Bullock, N. D., 174 N. W. 764.

19.——Estoppel. — Plaintiffs, suing to cancel stock of defendant company, issued to an individual defendant, and to enjoin him from disposing of or voting it, who obtained their stock by subsequent purchase from two of directors who attended a directors' meeting authorizing issuance of the stock, and who voted for resolution authorizing issuance, are in no position to assert that such meeting was illegal.—Berman v. Minneapolis Photo Engraving Co., Minn., 174 N. W. 735.

20.——Fraud in Organizing. — Where there was fraud and misrepresentation in an agreement providing for the forming of a corporation, the fact that the corporation was organized and executed its notes in accordance with the agreement will not prevent a court from adjudicating rights as between the parties themselves, independently of the corporation.—Goodspeed v. Law, U. S. C. C. A., 260 Fed. 497.

21.——Liability of Agent. — A corporation whose agent, in the discharge of duties intrusted to him by it, and within the apparent scope of his authority, does not act, whereby another suffers injury, is liable for the damages, though its agent may have failed in his duty to it or disobeyed instructions.—Kirk v. Montana Transfer Co., Mont., 184 Pac. 987.

22.——Stock.—Corporate stock of a domestic corporation is "personal property."—Le Roy Sargent & Co. v. McHarg, S. D., 174 N. W. 742.

23.——Wrongful Diversion.—Where those in management of a corporation misapply corporate assets and divert them into their own private use, a minority stockholder may maintain an action to compel restoration, to restrain such misconduct in future, and as an incident to such relief, in a proper case, may procure appointment of a receiver.—Tasler v. Peerless Tire Co., Minn., 174 N. W. 731.

24. **Criminal Law**—Corroboration.—It is not necessary that accomplice be corroborated in every material fact, the rule being that, if jury are satisfied that accomplice speaks the truth in some material part of his testimony in which they see him confirmed by other credible evidence, they may believe that he speaks the truth in other parts in which there may be no corroboration.—State v. Seitz, Ia., 174 N. W. 694.

25.——Corroboration of Accomplice.—The rule that in a criminal case defendant cannot be legally convicted upon the uncorroborated testimony of an accomplice does not apply in misdemeanors.—Kelley v. State, Ga., 100 S. E. 772.

26.——Former Jeopardy.—In a prosecution for illegally making alcoholic liquors, a plea that defendant had pleaded guilty in the United States District Court for violating the internal revenue laws was not good as a plea of former jeopardy; the crimes being distinct and the jurisdictions being different.—Tharpe v. State, Ga., 100 S. E. 754.

27.——Res Gestae.—Evidence of a separate and distinct offense from the one for which defendant is being tried may be introduced as constituting a part of the res gestae, where its commission is so closely connected with the one being tried as to be unseparable from it.—Hickey v. Commonwealth, Ky., 215 S. W. 431.

28.——Venue.—Where the president of a bank, by reason of his official position with it, embezzles its funds by drawing them by checks issued in another county, the venue of the crime is properly laid in the county in which the bank is situated.—Weathers v. State, Ga., 100 S. E. 768.

29. **Deeds**—Want of Consideration. — Since defendants had burden of proving that obtaining of deed was a fair transaction upon fair and adequate consideration, it does not help them that plaintiff failed to show a want of consideration.—Nolan v. Guggerty, Ia., 174 N. W. 706.

30. **Damages**—Poverty of Plaintiff.—In an action for personal injuries received by a plaintiff hurt when the electric car on which she was riding collided with a motor truck, testimony as to poverty of plaintiff is not admissible for any purpose and cannot be received even to show her mental suffering due to her alleged physical inability to make a living and her lack of funds.—Washington-Virginia Ry. Co. v. Deahl, Va., 100 S. E. 840.

31. **Descent and Distribution**—Half Blood.— Under statute of distribution, claimants of the half blood are entitled to share equally with claimants of the whole blood in the distribution of personal property.—In re Skinner's Estate, N. C., 100 S. E. 882.

32. **Divorce**—Cruel Treatment.—False accusations of infidelity of a wife are acts of cruel and inhuman treatment.—Anderson v. Anderson, Ia., 174 N. W. 665.

33.——Jurisdiction. — Where both defendant and his wife were residents of Georgia when he instituted his divorce proceeding against her in a circuit court of Alabama, and where service was had only by constructive service of publication in Alabama, the divorce was a nullity and no defense to defendant in his prosecution for bigamy based on his subsequent marriage to another woman.—Goolsby v. State, Ga., 100 S. E. 788.

34. **Easements**—Inconsistency.—The conveyance of an easement in land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement.—Gamma Alpha Bldg. Ass'n v. City of Eugene, Ore., 184 Pac. 973.

35. **Electricity**—Ordinary Care. — Where one experienced in his business has choice of doing certain work by a safe or a dangerous way, he must select the former, and if he voluntarily selects the latter when he knows, or in exercise of due care should know, of the danger, he is guilty of lack of ordinary care.—Columbus Power Co. v. Puckett, Ga., 100 S. E. 800.

36. **Equity**—Jurisdiction.—Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented.—Barber v. Superior Court of California in and for San Diego County, Cal., 184 Pac. 952.

37.——Laches.—Whether laches does or does not operate to defeat enforcement of a right asserted is not always to be determined merely by a consideration of the time that has elapsed since the accrual of the right to sue.—Browning v. Browning, W. Va., 100 S. E. 860.

38.——Laches.—Laches, unlike the statute of limitations, is not a mere matter of time, but involves or implies some other circumstances rendering inequitable the enforcement of a claim, such as change of relations of the parties or condition of the property.—Pratt v. Pratt, Cal., 184 Pac. 956.

39. **Estoppel**—Remaindermen. — Remaindermen were not estopped to deny that third person, who made improvements on the land under a contract by which the life tenant agreed to give him the land if he would take care of her during the rest of her life, had any rights to land or lien for improvements although they remained passive when they had knowledge that the improvements were being made, but did not know of the agreements between the life tenant and the third person.—Smith v. Richey, Ky., 215 S. W. 429.

40. **Exchange of Property**—Election. — A party, defrauded in an exchange of property, notwithstanding his offer to rescind, still has his election to sue in equity for rescission or at law for damages.—Bauer v. O'brien Land Co., Minn., 174 N. W. 736.

41. **Executors and Administrators**—Power to Sell.—Where a will confers on the executor power to sell lands devised, his power to convey by proper deed to the purchaser results by implication.—Buckner v. Buckner, Ky., 215 S. W. 420.

42. **Execution**—Redemption from Sale.—Redemption from the sale of property under decree or execution or judgment, by judgment creditor, is a matter provided for by statute, is a proceeding at law and not in equity, and statutes must be complied with.—Garden City Sand Co. v. Christley, Ill., 124 N. E. 729.

43. **Exemptions**—Tools of Trade.—A retired farmer, who occasionally made business trips with his automobile, and performed some small gatuitous service for others and used it in going to the market for merchandise required for the family, was not a "teamster or other laborer," within Code, § 4008, and the automobile was not exempt property, which his widow was entitled to.—In re McClellan's Estate, Ia., 174 N. W. 691.

44. **Fraud**—Reliance on Misrepresentation.—To entitle the buyer of land to defend an action on a note given for the price on the ground of fraud and misrepresentations, there must have been reliance by him on a material misrepresentation.—Bean v. Bickley, Ia., 174 N. W. 675.

45. **Frauds, Statute of**—Original Undertaking. —Where goods are furnished to one person on the credit and request of another, it is an original undertaking on the part of the person making the request, not within the scope of the statute of frauds.—Bejil v. Blumberg, Tex., 215 S. W. 471.

46.——Performance Within Year.—An agreement by a surety company executing bonds to pay its agent procuring the business a specified commission annually while the bonds were in force was without the statute of frauds as one performable by one of the parties within one year, being already performed by the agent.—National Surety Co. v. Murphy, Tex., 215 S. W. 465.

47. **Gaming**—Gambling Table. — The display or maintenance of a gambling table by one having authority over it, and the invitation or permission of the one having control over it to use the table for gambling purposes, constitutes a keeping or exhibiting, within the meaning of Rev. Code 1915, § 3568.—State v. Titleman, Del., 108 Atl. 92.

48. **Guaranty**—Strict Construction. — The guarantor is entitled to a strict construction of his contract, and can stand upon its very terms. —Acme Brick Co. v. West, Tex., 215 S. W. 476.

49. **Habeas Corpus**—Custody of Child.—While the legal and moral claims of claimants to custody of a child may not be ignored in disposing of such custody, the paramount consideration of the court is the welfare of the child, and as a general rule it should be placed where its best interests will be subserved.—Gill v. Walker, S. C., 100 S. E. 894.

50. **Homicide**—Intent.—Where a man kills another by the use of means appropriate to that end, he is presumed to have intended that end. —Kinsey v. State, Ga., 100 S. E. 770.

51.——Specific Intent.—Where defendant intended to shoot one person, but in fact shot and killed such person's wife, then present, the killing was with malice aforethought and specific intent, and support conviction of murder.—State v. Huston, Ia., 174 N. W. 641.

52. **Improvements**—Personal Judgment.—The naked fact that a stranger to the title of land feels an interest in seeing the property sell well, having owned it previously, and makes no objection, though he knows improvements are being placed upon the property, will not sustain either personal judgment against him nor any lien against the property in favor of the improver.—Mahnke v. Marken Acres Co., Ia., 174 N. W. 669.

53. **Insurance**—Burden of Proof.—In an action on a fire policy, the burden is upon plaintiff to show that his cause of action does not fall within excepting clauses in the policy.—Northwestern Nat. Ins. Co. v. Westmoreland, Tex., 215 S. W. 471.

54.——Murder by Beneficiary.—Where beneficiary in life insurance policy murders insured, and hence cannot recover on grounds of public policy, insurer's liability to pay the fund is not thereby extinguished, and ordinarily a recovery will be allowed in name of insured's personal representative for benefit of his estate.—Johnston v. Metropolitan Life Ins. Co., W. Va., 100 S. E. 865.

55.——Reformation of Policy.—Where plaintiff's husband, negotiating with insurer's agent for fire insurance policy on plaintiff's property, informed agent that property belonged to her, and that title was in her name, and court found that husband and agent mutually intended that she be named in policy as assured, and that through inadvertence of insurer the husband's name was inserted as owner, without knowledge of himself or wife, trial properly awarded a reformation substituting her name in policy as the person insured.—Sundin v. County Fire Insurance Co. of Philadelphia, Minn., 174 N. W. 729.

56.——Relinquishment of Right.—A "waiver" is the intentional relinquishment of a known right, or such conduct as warrants an inference of such relinquishment, and, where conduct of association is relied upon to constitute a waiver of prompt payment of dues and assessments for reinstatement, it must appear that insured was induced by the association to do or omit some act which he would not otherwise have done or omitted.—Fahey v. Ancient Order of United Workmen, Ia., 174 N. W. 650.

57. **Landlord and Tenant**—Contingent Limitation.—A provision in a lease, "Should the parties of the first part (the lessors) make a sale of land herein leased, then, and in that event this lease will immediately become void," operated as a contingent limitation of the lease term, and when the contingency happened, all rights under the contract, including the right of occupancy, terminated.—Johnson v. Phelps, Tex., 215 S. W. 446.

58.——Crops.—A bona fide purchaser, without notice of a crop grown on rented premises, will be protected against the lien, general or special, of the landlord for rent.—Collins v. Harrison, Ga., 100 S. E. 794.

59.——Hostile Possession.—In order that entry on land by lessor amount to a resumption of possession, it must be inconsistent and hostile to the right of possession of the tenant.—Goodman v. Republic Inv. Co., Tex., 215 S. W. 466.

60.——Lease.—The lease of a residence contemplates the housing therein of the lessee's family, the entertainment of his guests, and the entry therein of all persons whose relations with the occupants, whether of business or otherwise, requires, or reasonably calls, for such entry.—Ciaccio v. Carbajal, La., 83 So. 73.

61.——Repairs.—A lessee, in the absence of express agreement, is not bound to make substantial and lasting repairs or improvements.—Des Moines Steel Co. v. Hawkeye Amusement Co., Ia., 174 N. W. 703.

62. **Libel and Slander**—Libel per se.—It is libelous per se to write of or concerning a white person that said person is colored.—Collins v. Oklahoma State Hospital, Okla., 184 Pac. 946.

63.——Protection Against.—Subject to qualifications and restrictions provided by law, every person has a right to protection from defamation by libel or slander, and any person who abuses the freedom of speech and liberty of the press by maliciously publishing libelous matter is liable for the injury occasioned thereby.—Englund v. Townley, N. D., 174 N. W. 755.

64. **Malicious Prosecution** — Termination of Prosecution.—In order to recover for malicious use of legal process, malice, want of probable cause, and a termination of the proceedings in favor of defendant are necessary before suit may be brought.—Marshall v. Armour Fertilizer Works, Ga., 100 S. E. 766.

65. **Master and Servant**—Guards to Machinery.—An uncovered cogwheel is a danger, and it is negligence to leave it uncovered, even temporarily, without notice to operatives passing it on their way from work.—Gordon v. Stehli Silks Corporation, N. C., 100 S. E. 884.

66. **Mechanics' Lien**—Description of Property.—Any description in a mechanic's lien statement which will enable a party familiar with the locality to identify the property with reasonable certainty is sufficient as between the parties.—MacPherson v. Crum, N. D., 174 N. W. 751.

67. **Mortgages**—Statutory Sale. — Statutory sales under powers of sale are in derogation of the common law, and statutes authorizing the same should be strictly construed.—Gillette v. Abrahams, S. D., 174 N. W. 745.

68. **Negligence**—Burden of Proof.—Where the injury may, with equal or greater probability, result from a different cause, for which defendant is not liable, the verdict cannot stand.—Kerr v. Bush, Mo., 215 S. W. 393.

69. **Partnership**—Dissolution. — Where complainant alleging a partnership made an assignment for benefit of creditors and subsequently was adjudicated a bankrupt, any partnership that may have existed was thereby dissolved.—Orman v. Wilson, Ala., 83 So. 57.

70.——Sharing Profits.—One of the important tests in determining the existence of a partnership is the sharing of profits and losses, though such test is not conclusive, as there may be a sharing of profits with an agent or servant as partial compensation for services, which relationship will not constitute a partnership.—Moore v. Thompson, Kan., 184 Pac. 980.

71. **Railroads**—Contributory Negligence. — A passenger on a motorcycle approaching a railroad crossing is guilty of contributory negligence, where he does not keep a proper lookout and does not caution the driver.—Sackett v. Chicago, Great Western R. Co., Ia., 174 N. W. 658.

72.——Grade Crossing.—The state may require the separation of grade crossings as a matter of police regulation, and place the burden on the railroad or the municipality or apportion it as it sees fit.—Application of Kaiser, Wis., 174 N. W. 714.

73.——Last Clear Chance.—Where one was thrown onto a railroad track by an automobile at a crossing, and the engineer, if he had exercised due care, could have seen him in time to have stopped the train, but failed to do so, the railroad was liable for running over him.—Ching Wing v. Southern Pac. Co., Cal., 184 Pac. 949.

74. **Receivers**—Appointing Counsel.—Though a receiver usually secures his own counsel, he cannot make any contract of hiring or agreement for compensation that is binding on the court, whose function it is to determine both the necessity for counsel and the compensation to be allowed them.—Marble v. Husbands, Ky., 215 S. W. 435.

75. **Receiving Stolen Goods**—Recent Possession.—Mere possession of stolen goods, standing alone, does not establish knowledge or guilt; but it is a circumstance to be considered in connection with the whole case.—State v. Malvarosa, Del., 108 Atl. 95.

76. **Sales**—Caveat Emptor. — The rule of caveat emptor does not apply, where the seller fraudulently conceals a latent defect affecting the value of the property for the purpose for which it is bought.—Hays v. Azbill, Okla., 184 Pac. 945.

77.——Express Warranty.—No particular form of words are necessary to constitute an express warranty.—Riser v. Cox, Ia., 174 N. W. 701.

78.——Implied Warranty. — Where written terms of a dealer's contract and order expressly warranted a machine sold thereunder to do good work when properly set up and adjusted, no issue could be raised by buyer on an alleged implied warranty as to its fitness for the use for which it was intended.—Advance-Rumley Thresher Co. v. Nelson, Kan., 184 Pac. 982.

79.——Nominal Damages.—In buyer's action for seller's refusal to deliver, where there was evidence to establish a sales contract and a breach thereof by seller, buyer was entitled to recover at least nominal damages.—Morrison & Hild v. Marks, N. C., 100 S. E. 890.

80. **Specific Performance** — Forfeiture. — Where a land sale contract of its own terms and force worked a forfeiture of the same on default in the payment of notes without affirmative action on the part of the vendor, such forfeiture could be waived, and the burden of showing waiver rested upon the complainant purchaser suing for specific performance.—Davis v. Folmar, Ala., 83 So. 60.

81. **Subscriptions**—Charitable Purpose.—Generally, a promise to donate money to a charitable purpose is gratuitous and unenforceable unless some consideration therefor exists.—Miller v. Oglethorpe University, Ga., 100 S. E. 784.

82. **Vendor and Purchaser** — Possession as Notice.—Possession is such a fact, though dehors the record, as presses its attention upon a purchaser or mortgagee of the record title holder, so as to imply notice or necessitate an inquiry that would lead to knowledge of the character of such possession and any equities in the possessor, except where possessor is grantor.—Wyatt v. Touvelle, Ky., 215 S. W. 418.

83.——Quieting Title.—In an action to quiet title, where defense was that defendant was entitled to possession under contract of sale, the burden was on the plaintiff, having conceded a waiver of the right of forfeiture of the contract for delay in payments, to show a revival of the terms of the contract by proof of a definite and specific notice of an intention to enforce it.—Bayside Land Co. v. Phillips, Cal., 184 Pac. 951.

84. **Wills**—Attestation.—A will signed by testator in the presence of the witnesses, who attested it in his presence and in the presence of each other, held sufficiently published, where the witness who wrote it read it to testator and then called in the other witness, who read enough to know that it was testator's will.—In re Salmons' Will, Del., 108 Atl. 93.

85.——Direction Applied for.—Where the parties were justified in applying to the court for instructions as to the construction of a will, reasonable expense of the litigation, including counsel fees, should be charged against the estate.—Reed v. Creamer, Me., 108 Atl. 82.

86.——Heirs.—The word "heirs" in a will primarily is used in its legal or technical sense, and, unless the context shows a contrary intent, must be so construed.—Johnson v. Coler, Ia., 174 N. W. 654.

87.——Olographic Will.—Where an olographic will was admitted to probate with a separate residuary clause as part of it, on subsequent contest the burden rested on contestants to show the residuary clause objected to was not a valid testamentary disposition by testator because not dated; the original order of probate creating a prima facie presumption that the will, residuary clause and all, was a single instrument covered by the single date.—In re Hartley's Estate, Cal., 184 Pac. 950.